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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/534,970

12/21/2005

Harald Albrecht

P27849

1728

7055 7590 11/06/2008
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EXAMINER

HELM, CARALYNNE E

ART UNIT

PAPER NUMBER

1615

NOTIFICATION DATE

DELIVERY MODE

11/06/2008

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/534,970	Applicant(s) ALBRECHT ET AL.	
	Examiner CARALYNNE HELM	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 July 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Response to Arguments

Claim of Foreign Priority:

The Office has received a certified copy of the foreign priority document.

Information Disclosure Statement

The reference number DE 102 16 502 was lined through and has not been considered because it is not in English. Currently there is nothing of record that states that document family member WO 03/084501 is an equivalent to this German document. The duplicate of the 12/21/05 IDS that applicant submitted on 7/29/08 has been annotated and is included with this Office action to indicate that only the English abstract of WO 03/084501 was considered.

Regarding Rejections under 35 U.S.C. 112, second paragraph:

Applicants' arguments, filed July 29, 2008, have been fully considered but they are not deemed to be persuasive. "When materials recited in a claim are so related as to constitute a proper Markush group, they may be recited in the conventional manner, or alternatively. For example, if "wherein R is a material selected from the group consisting of A, B, C and D" is a proper limitation, then "wherein R is A, B, C or D" shall also be considered proper." See MPEP 2173.05(h) II. Here applicant has claimed a set of materials that constitute a Markush group in claims 1-3 and 10-11. These claims do

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not recite the options for the surfactant, hydrocolloid or water-soluble salt, with appropriate closed construction or reference the options in the alternative as required.

Regarding Rejections under 35 U.S.C. 103:

Applicants' arguments, filed July 29, 2008, have been fully considered but they are not deemed to be persuasive. Applicant has argued that one of ordinary skill would not have been motivated to vary the composition of Malik et al., the examples of Malik et al. teach compositions with 15% total surfactant, there would be no motivation to combine Malik et al. and Hagan et al., and one would not have been motivated to combine Furman et al. with Malik et al. and Hagan et al. Since Malik et al. teach a set of ranges of proportions for each of the envisioned surfactants included in their taught compositions, they certainly contemplated variations within these claimed ranges as well as obvious modifications thereof (see column 2 line 62-column 3 line 14). In addition, Malik et al. state that the examples were provided as illustrations of the invention and were not to be interpreted in any way as limitations of the invention (see column 9 lines 40-44). Thus the teachings of Malik et al. are by no means limited to just those illustrated in examples. Further since the lower boundary of the envisioned ranges of surfactants total 6%, Malik et al. did contemplate a total surfactant concentration within the claimed range. As for the combination of the references, each of the three references teaches topical cleaning compositions that include the same type, if not the same, surfactants. Since they are analogous art and teach compositions with similar

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construction, components and that used for the same purpose there would have been motivation for one of ordinary skill in the art to combine them.

Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-3 and 10-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1-3 and 10-11 contain improperly constructed Markush groups. "The transitional phrases "comprising", "consisting essentially of" and "consisting of" define the scope of a claim with respect to what unrecited additional components or steps, if any, are excluded from the scope of the claim...the court noted the phrase 'group consisting of' is a closed term, which is often used in claim drafting to signal a 'Markush group' that is by its nature closed." See MPEP 2111.02. Presently the recited listing of alternative limitations in the claims do not use closed claim language.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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Claims 1-4, 6-13, 17-18, and 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malik et al. (U.S. Patent No. 4,668,422) in view of Hagan et al. (EP 0559375 – see IDS).

Malik et al. teach a cosmetic cleansing composition with 3 to 30 wt% glycoside surfactant, 1 to 20 wt% nonionic foam boosting surfactant, 2 to 30 wt% anionic surfactant, amphoteric surfactant or a mixture thereof, and up to 95 wt% water (see column 2 line 62-column 3 line 14). This teaching means that the embodiment where the surfactants totaled 6wt% of the total composition was contemplated (see instant claims 1 and 21-23). The taught composition was exemplified with sodium α -olefin sulfonate (anionic surfactant), sodium lauryl sarcosinate (anionic surfactant), ammonium chloride, water, a particular foam boosting surfactant and a particular glycoside surfactant (see example 15 and column 2 lines 58-62; instant claims 1, 3, 8-9, and 11). Here the ammonium chloride constitutes 2wt% of the composition (see example 15; instant claim 1). This example indicated particular surfactants that were envisioned by Malik et al. as suitable for inclusion in their composition. This example teaches the total surfactant content to be 17wt%; however, since it was certainly envisioned by Malik et al. that the proportion of surfactant in the composition be lower, it would have been obvious to one of ordinary skill in the art at the time of the invention to optimize this parameter during the course of routine experimentation. In addition, Malik et al. also teach the inclusion of preservatives in their invention (see column 7 lines 16-20; instant claims 4 and 12-13). Further, Malik et al. teach that ammonium chloride and sodium chloride as well as carboxymethyl cellulose, polyacrylic acid and other cellulose ethers

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serve as thickeners in the composition (see column 7 lines 2-15; instant claims 1-2). Malik et al. go to teach that the composition of the invention produces a soft feel on the hands when used to wash hands, implying the step of applying the product to the skin (see column 9 lines 38-40; instant claims 7 and 20). Malik et al. also teach the production of their compositions where the components, at their desired proportions, are combined together (see column 9 lines 54-26; instant claims 22-23) Malik et al. do not specifically teach the inclusion of the taught hydrocolloids and a salt, simultaneously, as thickeners in the composition, the amount of preservative that should be employed, nor the vessel in which the composition is stored.

Hagan et al. teach a bath foam that uses both sodium chloride and sodium carboxymethyl cellulose as thickeners (see example 15). Hagan et al. use this hydrocolloid at 1% (see example 15; instant claim 1). It would have been obvious to one of ordinary skill in the art at the time the invention was made to use both a hydrocolloid and salt as thickeners in the composition of Malik et al. since the viscosity of the final preparation was a variable that would be obvious to optimize through routine experimentation and was within the purview of the ordinarily skilled artisan. Further, Hagan et al. teach the inclusion of preservative in their cleansing composition at 0.3% (see example 15; instant claims 4 and 12). Hagan et al. teach go on to teach that the cleansing compositions are dispensed from an aerosol dispenser (can) (see page 11 lines 19-21; instant claims 6 and 17-18). Since both Hagan et al. and Malik et al. teach foaming cosmetic compositions (see Malik et al. column 9 lines 9-12) , it would have been obvious to one of ordinary skill in the art at the time the invention was made to

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apply the teachings of Hagan et al. in the invention of Malik et al. to guide the amount of preservative used as well as the vessel used to store and potentially dispense the composition for use. Therefore claims 1-4, 6-13, 17-18, and 20-23 are obvious over Malik et al. in view of Hagan et al.

Claims 1-2, 4-5, 8, are 14-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malik et al. in view of Hagan et al. as applied to claims 1-4, 6-13, 17-18, and 20 above, and as evidenced by Furman et al. (U.S. Patent No. 5,883,059).

Malik et al. in view of Hagan et al. make obvious a composition with sodium α -olefin sulfonate, sodium lauryl sarcosinate, ammonium chloride, hydrocolloid (cellulose ethers), water, and preservative, with the surfactants at the claimed proportion, the ammonium chloride at 2%, the hydrocolloid at 1%, and the preservative at 0.3% (instant claims 1-2, 4, and 8). Malik et al. also teach the presence of cocoamido monoethanol amine (also known as cocoamide MEA) in the exemplified composition (see example 15). Furman et al. teach that cocoamide MEA is a nonionic surfactant (see claim 4 part e). Surfactants are known for their ability to solubilize poorly water soluble compounds. Therefore the taught cocoamino monoethanol amine in the invention of Malik et al. is a solubilizer (instant claims 5 and 14-16). Thus claims 1-2, 4-5, 8, are 14-16 are obvious over Malik et al. in view of Hagan et al. and as evidenced by Furman et al.

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Claims 1-2 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Malik et al. in view of Hagan et al. as applied to claims 1-4, 6-13, 17-18, and 20 above, and further in view of Scholz et al. (U.S. Patent No. 6,641,825).

Malik et al. in view of Hagan et al. make obvious a composition with sodium α -olefin sulfonate, sodium lauryl sarcosinate, ammonium chloride, hydrocolloid (cellulose ethers), water, and preservative, with the surfactants at the claimed proportion, the ammonium chloride at 2%, the hydrocolloid at 1%, and the preservative at 0.3% (instant claims 1-2, 4, and 8). Malik et al. teach that thickeners are to be used to modify the viscosity of their invention to a particular level (see column 7 lines 2-15). Scholz et al. teach a cleansing cosmetic composition where thickeners are also used and particularly exemplify montmorillonites as one particular thickener suitable for such a composition (see abstract and column 3 lines 62). A person of ordinary skill in the art would have good reason to pursue the options within their technical grasp. Thus since montmorillonites were known at the time of the invention as thickeners in skin cleansing compositions, it would have been obvious to one of ordinary skill in the art at the time of the invention to use montmorillonites as a hydrocolloid thickener and used along with the ammonium chloride salt in the composition taught by Malik et al. in view of Hagan et al. in order to achieve the desired end viscosity. Therefore claims 1-2 and 19 are obvious over Malik et al in view of Hagan et al. and Scholz et al.

Conclusion

No claim is allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CARALYNNE HELM whose telephone number is (571)270-3506. The examiner can normally be reached on Monday through Thursday 8-5 (EDT).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Caralynne Helm/
Examiner, Art Unit 1615

/MP WOODWARD/
Supervisory Patent Examiner, Art Unit 1615